BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LENORA SPRIGGS	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,028,372
	)	
TARGET DISTRIBUTION CENTER	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the December 18, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The claimant alleged she suffered injury to her left shoulder and neck while working for respondent on January 25, 2005. The respondent had provided claimant medical treatment and after she was released from treatment with Dr. Brett E. Wallace on April 27, 2005, claimant had received a letter that her claim was being denied and the insurance carrier would only pay for medical treatment received through May 10, 2005.

At a preliminary hearing held August 30, 2006, the respondent denied claimant suffered accidental injury arising out of and in the course of her employment and further denied claimant had filed timely written claim. It was agreed that written claim (the E-1 Application for Hearing) was received by respondent on April 7, 2006. Respondent argued that the written claim was over 200 days after claimant had been told that no further medical treatment would be provided for the January 25, 2005 accidental injury.

But at the preliminary hearing the Administrative Law Judge (ALJ) noted that the medical records indicated respondent had referred claimant for additional treatment and she saw Dr. Donald T. Mead on October 3, 2005. The written claim was within 200 days of that date. The respondent conceded that if the appointment with Dr. Mead was authorized and for the January 25, 2005 accidental injury then the April 7, 2006 written claim would be timely. However, the medical record of the office visit on October 3, 2005 noted claimant had an aggravation of her symptoms on July 25, 2005. The claimant denied that she suffered any additional injury or aggravation and the ALJ surmised the July entry in the record was probably a typographical error and should have read January.

On August 31, 2006, the ALJ entered an Order for respondent to provide claimant additional medical treatment for her January 25, 2005 accidental injury. Implicit in that order is the determination claimant suffered accidental injury arising out of and in the course of her employment and that she provided timely written claim. That decision was not appealed.

On October 26, 2006, respondent filed an Application for Preliminary Hearing seeking to terminate benefits to claimant. Respondent argued that claimant had suffered a new injury on July 25, 2005, and so that date was not a typographical error in the medical records. Consequently, the referral to Dr. Mead was for a new injury unrelated to claimant's January 25, 2005 accidental injury. Accordingly, respondent again argued that claimant did not file a timely written claim for the January 25, 2005 accidental injury and her claim for compensation should be denied. But respondent conceded that if the October 3, 2005 appointment with Dr. Mead was authorized for the January 25, 2005 accidental injury, then written claim would be timely.

After a preliminary hearing held December 13, 2006, the ALJ denied the respondent's request to terminate benefits and determined claimant filed timely written claim. The ALJ concluded respondent never disabused claimant of her belief that the additional treatment was for the January 25, 2005 accident.

Respondent requests review and argues claimant does not dispute that she was told by letter dated May 10, 2005, that she would not receive any further treatment for her January 25, 2005 accident. And the subsequent referral for medical treatment was for a new accident rather than additional treatment for the January 25, 2005 accidental injury. As claimant did not file written claim within 200 days of being told no further medical treatment would be provided the respondent argues her claim should be denied.

Claimant denies that she suffered additional injury or aggravation and notes after her claim was denied she returned to the plant nurse seeking treatment and finally was referred to Dr. Mead for additional treatment for her January 25, 2005 accidental injury. And her written claim was within 200 days of her October 3, 2005 appointment with Dr. Mead. Claimant requests the Board to affirm the ALJ's Order.

The sole issue appealed to the Board is whether claimant filed a timely written claim for the January 25, 2005 accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. The statute provides in pertinent part:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; . . .

The furnishing of medical care to an injured employee is considered the payment of compensation under the Workers Compensation Act when authorized, either expressly or by reasonable implication, by the employer.[1] If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day limitation to take effect.[2]

After the January 25, 2005 accidental injury the respondent provided claimant with medical treatment. However, by letter dated May 10, 2005, claimant was told that her claim was being denied and no further medical treatment would be provided. On May 11, 2005, the claimant returned the Ginger Reaves, a nurse for respondent, and noted that she was frustrated with the denial of her claim. But claimant continued to seek additional treatment for her symptoms which she attributed to her January 25, 2005 accidental injury. On July 28, 2005, claimant again returned to Ms. Reaves with pain that she felt was a re-occurrence of her pinched nerve from a few months ago. On September 30, 2005, claimant again requested respondent provide medical treatment for her continuing neck and shoulder pain. Ms. Reaves then scheduled an appointment for claimant with Dr. Mead on October 3, 2005.

Initially, it should be noted that claimant was disabused of her assumption that continued medical treatment would be authorized by respondent when she received the May 10, 2005 letter which stated that her claim was denied and further medical treatment would not be provided after the date of the letter. It is equally clear that respondent authorized claimant to see Dr. Mead on October 3, 2005, and the nurse's notes simply indicate the referral was for her neck and shoulder pain.

When the time for filing a claim for compensation has passed the right to recover is lost and cannot be revived.[3] Moreover, a claim once barred due to the running of the statute of limitations cannot be revived even by subsequent voluntary payments of

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[1] *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, 642 P.2d 574 (1982).

[2] *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

[3] *Graham v. Pomeroy*, 143 Kan. 974, 57 P.2d 19 (1936).

compensation by the employer.[4] On May 10, 2005, the claimant was disabused of the assumption that respondent would provide further medical treatment but she was then referred for additional treatment at an appointment on October 3, 2005. As the 200 days had not run between those dates, if the subsequent medical treatment was for the January 25, 2005 accidental injury then the statute of limitations were tolled by the visit to Dr. Mead.

The dispositive issue is whether the referral to Dr. Mead on October 3, 2005 was for additional treatment for the January 25, 2005 accident. And that issue arose because Dr. Mead's office notes from October 3, 2005, reflect claimant was seen for aggravation of symptoms and listed the date of accident as July 25, 2005.[5]

It is interesting to note that the nurse's note of July 28, 2005, refers to claimant awakening with shoulder and neck pain and that claimant felt she had slept on her neck wrong. The note further indicated claimant felt the pain was a re-occurrence of her pinched nerve from a few months ago. But there is no mention of a July 25, 2005 date.[6] Nonetheless, the nurse then filled out a Patient Care Report and listed the incident date as July 25, 2005, and that the incident had occurred off-site.

Claimant denied that she suffered either an aggravation or new injury and that her continued complaints referred back to her original January 25, 2005 accidental injury. Claimant further testified that it was respondent's policy to send employees for a drug screen when they have accidents. After claimant reported her January 25, 2005 accident she was sent for a drug screen. After she injured her knee at work on September 17, 2005, she was sent for a drug screen. But she was not sent for a drug screen after that as she did not have any additional accidental injury. Claimant noted that she continued to seek additional treatment and Ms. Reaves had acquiesced and told her that her claim would be re-filed to see if additional treatment would be provided. She testified:

> Q. Okay. Well, let me ask it this way, I have a report from him [Dr. Mead] dated October 3rd of 2005; did you see him on that date?
>
> A. I think that would be, and that's what I'm saying, I think that would have been when Ginger says let's try to refile this claim, and that's when she sent me back to him again.[7]

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[4] *Solorio v. Wilson & Co.*, 161 Kan. 518, 169 P.2d 822 (1946).

[5] P.H. Trans. (Aug. 30, 2006), Cl. Ex. 4.

[6] Reaves Depo., Ex. 1.

[7] P.H. Trans. (Aug. 30, 2006) at 29.

The claimant further denied that she and Ms. Reaves agreed to submit her claim with a new date of injury. Claimant testified:

> Q. Ma'am, you are aware that Target was denying you[r] worker's compensation claim, correct?
>
> A. Yes.
>
> Q. And you went back to Ms. Reaves on occasion and she had testified that you were not happy about that denial obviously, is that correct?
>
> A. Right.
>
> Q. She has also testified that you went back and saw her. She advised that claim was still denied, but they would set it up with a new date of injury and see if that would work, is that also correct?
>
> A. No.
>
> Q. What conversation went on between you and Ms. Reaves when you were sent back to the doctor?
>
> A. There was never anything said about a new injury. She just said that we would resubmit it just to try to get them to pay for it.[8]

Ms. Reaves could not recall any conversation with claimant about filing a new claim.

The claimant denied she suffered a new accident or an aggravation on July 25, 2005. Nor was she referred for a drug screen which she had been when she had previously suffered work-related accidents. Instead the claimant was under the assumption that she was again being referred for treatment for her January 25, 2005 accidental injury. Consequently, the October 3, 2005 authorized referral to Dr. Mead tolled the 200-day time limitation. The parties agree that written claim was provided respondent on April 7, 2006. Such written claim is within 200 days from claimant's office visit with Dr. Mead on October 3, 2005. Consequently, claimant has met her burden of proof to establish that she made timely written claim.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as

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[8] P.H. Trans. (Dec. 13, 2006) at 9-10.

[9] K.S.A. 44-534a.

permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated December 18, 2006, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of February 2007.

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BOARD MEMBER

c: Stephanie J. Haggard, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge

[10] K.S.A. 2005 Supp. 44-555c(k).